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Perwira Habib Bank Bhd v Penerbitan Asa Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR EXECUTION NO 36–4 OF 1998
STEVE SHIM J
B 17 AUGUST 1998

Civil Procedure *— Execution — Prohibitory order — Application for — Body of praecipe bearing the heading of 'Praecipe for Prohibitory Order' in effect was seeking an issuance of a writ of seizure and sale — Whether prohibitory order obtained by proper procedure*

C ***Civil Procedure*** *— Execution — Prohibitory order — Application for — Whether only a judge has competent jurisdiction*

Civil Procedure *— Execution — Writ of seizure and sale — Application to set aside — Immovable property — Whether writ of seizure and sale should be issued*

D The judgment creditor ('JC') filed a 'Praecipe Untuk Perintah Larangan' in consequence of which the prohibitory order ('PO') dated 12 March 1998 was granted by the senior assistant registrar ('SAR'). Concurrently, the JC also filed the 'Praecipe Untuk Writ Pelaksanaan' for which the SAR granted the writ of seizure and sale ('WSS'). The judgment debtor ('JD') applied to set aside the PO and the WSS on
E the grounds that: (i) the WSS is unnecessary in a case involving immovable property; and (ii) the PO is invalid as the application has to be made to a judge and not to the SAR, and that the PO had been wrongfully obtained by way of an improper procedure.

F **Held**, allowing the application:

(1) There is substance in the contention that there is no necessity for the issuance of a WSS where the subject matter concerns immovable property for the following reasons: (i) the Rules of the High Court 1980 ('the RHC') do not specifically provide for one; (ii) once the PO has been granted, it tantamounts to
G an authorization for seizure of the immovable property, as evident in O 47 r 6(1) and (3); and (iii) the issue of sale of immovable property is subject to a separate application, usually by way of summons-in-chambers (see ss 256 and 337 of the National Land Code 1965 and O 47 r 1(3) of the RHC) (see p 390A–B, D).

H (2) In the light of O 1 r 4(2) and O 32 r 9 of the RHC, an application for a PO can be dealt with by the deputy registrar, or the SAR or by the judge himself (see p 389F).

(3) An application has to be made for a PO to be issued and the practice is to apply by way of 'Praecipe Untuk Perintah Larangan'
I addressed to the Pendaftar, Mahkamah Tinggi. In the instant case, the body of the praecipe which bore the heading of 'Praecipe Untuk Perintah Larangan' in effect was seeking an issuance of a

WSS and it was on the basis of this praecipe that the SAR granted the PO. Thus, the procedure has not been strictly followed and the PO was not validly granted (see p 389G–I).

Obiter:

It is the practice for the JC to apply for both the PO and the WSS concurrently and this is done through the filing of a 'Praecipe Untuk Perintah Larangan' and 'Praecipe Untuk Writ Pelaksanaan'. Given such a practice, the WSS granted in the instant case would have been adversely affected since the PO is found to have been wrongfully obtained and, therefore, invalid. But if separate applications are allowed as some of the authorities seem to indicate, then the procedure to be adopted is to first apply for the PO, to be followed by an application for a WSS. Even if this procedure is acceptable as a matter of practice, it would still militate against the granting of the WSS, since the PO has been declared to have been wrongfully obtained (see p 390E–G).

[Bahasa Malaysia summary

Pemiutang penghakiman ('PMP') memfailkan satu 'Praecipe Untuk Perintah Larangan' yang mana satu perintah larangan ('PL') bertarikh 12 Mac 1998 telah diberikan oleh penolong kanan pendaftar ('PKP'). Pada masa yang sama, PMP juga memfailkan satu 'Praecipe Untuk Writ Pelaksanaan' yang mana PKP telah memberikan satu writ penyitaan dan penjualan ('WPP'). Penghutang penghakiman ('PHP') telah memohon untuk mengenepikan PL dan WPP tersebut atas alasan bahawa: (i) WPP tersebut tidak perlu di dalam satu kes berhubungan dengan harta tak alih; dan (ii) PL tersebut adalah tidak sah kerana permohonan hendaklah dibuat kepada seorang hakim dan bukan kepada PKP, dan PL telah diperolehi secara salah dengan prosedur yang tidak betul.

Diputuskan, membenarkan permohonan:

(1) Terdapat substans dalam hujahan bahawa tidak terdapat keperluan untuk pengisuan satu WPP bilamana perkara yang menjadi subjek berhubung dengan harta tak alih, untuk sebab-sebab yang berikut: (i) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') tidak memperuntukkan secara spesifik untuknya; (ii) bila PL tersebut telah diberikan, ia berjumlah kepada satu pemberian kuasa untuk menyita harta tak alih tersebut, seperti yang jelas dalam A 47 k 6(1) dan (3); dan (iii) isu penjualan harta tak alih adalah tertakluk kepada satu permohonan yang berasingan, biasanya melalui saman dalam kamar (lihat ss 256 dan 337 Kanun Tanah Negara 1965 dan A 47 k 1(3) KMT) (lihat ms 390A–B, D).

(2) Memandangkan kepada A 1 k 4(2) dan A 32 k 9 KMT, satu permohonan untuk PL boleh dikendalikan oleh timbalan pendaftar, atau PKP atau oleh hakim sendiri (liat ms 389F).

(3) Satu pemohonan hendaklah dibuat untuk PL diberi dan amalannya adalah untuk memohon dengan menggunakan Praecipe Untuk Perintah Larangan yang ditujukan kepada Pendaftar, Mahkamah Tinggi. Dalam kes ini, badan praecipe tersebut yang membawa tajuk 'Praecipe Untuk Perintah Larangan' sebenarnya memohon untuk satu pengisuan WPP dan adalah di atas dasar praecipe ini, PKP telah membenarkan PL tersebut. Oleh itu, prosedur tersebut telah tidak dipatuhi dengan ketat dan PL tidak diberikan secara sah (lihat ms 389G–I).

Obiter:

Adalah menjadi amalan untuk PMP memohon untuk kedua-dua PL dan WPP secara serentak dan ini adalah dilakukan melalui pemfailan satu 'Praecipe Untuk Perintah Larangan' dan 'Praecipe Untuk Writ Pelaksanaan'. Memandangkan kepada amalan tersebut, WPP yang diberikan dalam kes ini adalah terjejas memandangkan PL tersebut telah didapati sebagai diperolehi secara salah dan oleh yang demikian, adalah tidak sah. Tetapi, jika permohonan yang berasingan adalah dibenarkan seperti yang kelihatan ditunjukkan oleh beberapa autoriti-autoriti, prosedur yang perlu digunakan adalah memohon untuk PL terdahulu, diikuti oleh satu permohonan untuk WPP. Jikapun prosedur ini boleh diterima secara amalannya, ia masih menghalang pemberian WPP, memandangkan PL tersebut telah diisytiharkan sebagai diperolehi secara salah (lihat ms 390E–G).]

Notes

For cases on writ of seizure and sale, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1873–1885.

For cases on prohibitory order, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1820–1823.

Cases referred to

Ban Hin Lee Credit Sdn Bhd v Utama Computer Centre Sdn Bhd & Ors [1991] 2 MLJ 327 (refd)

K Murugesu v Michael Chong Ngian Fong; K Murugesu v Registrar of Titles & Ors [1980] 2 MLJ 84 (refd)

Karuppiah Chettiar v Subramaniam [1971] 2 MLJ 116 (refd)

Legislation referred to

National Land Code 1965 ss 256, 337

Rules of the High Court 1980 O 1 r 4(2), O 32 r 9, O 46 r 4, O 47 rr 1(3), 6(1), 6(3), 6(5), 7

James Selva (*Ong Kok Bin & Co*) for the judgment debtor.

Paul Kwong (*Azman, Davidson & Co*) for the judgment creditor.

Steve Shim J: This is an application by the second defendant who is the judgment debtor ('JD') for the setting aside of the writ of seizure and sale ('WSS') as well as the prohibitory order ('PO') dated 12 March 1998 obtained by the plaintiff who is the judgment creditor (JC), against the JD. It is supported by the affidavit of Adian Maniza bte Mohd Zain. The JC has opposed the application.

The facts show that pursuant to an application for execution (encl 6), the JC filed a 'Praecipe Untuk Perintah Larangan' purportedly in accordance with Form 92 of O 46 r 4 of the Rules of the High Court 1980 ('the RHC') in consequence of which the PO dated 12 March 1998 was granted by the learned senior assistant registrar (SAR) as per encl 3. Concurrently, the JC also filed the 'Praecipe Untuk Writ Pelaksanaan' (encl 4) for which the SAR granted the WSS as in encl 5.

The main complaint of the JD is: (1) that the WSS is unnecessary in the instant case involving immovable property; and (2) that the PO dated 12 March 1998 is invalid. I shall deal with them separately. For reasons which will become apparent later, I will deal with the second proportion first.

Fundamental to this second proposition are two underlying issues raised by the JD, namely: (1) that any application for a PO has to be made to a judge and not to the SAR or inversely speaking, that only a judge has competent jurisdiction to deal with such an application and not the SAR; and (2) that the PO had been wrongfully obtained by way of an improper procedure.

In respect of the first issue, Mr Selva, counsel for the JD has drawn our attention to O 47 rr 6(1) and (5) of the RHC which comes under the heading 'Writs of Seizure And Sale' and which stipulates:

> Where the property to be seized consists of immovable property or any registered interest therein the following provisions shall apply:
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> (1) Seizure shall be made by an order prohibiting the judgment-debtor from transferring, charging or leasing such property or interest. For the purpose of this rule 'charging' shall include the creation of a lien by deposit of a document of title; ...
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> (5) *Upon the application of any judgement-creditor on whose application a prohibitory order has been issued the Court or a Judge*, if it or he considers that special circumstances render an extension just, may from time to time by order extend the period of six months ... (Emphasis added.)

It is counsel's contention that the words underscored above can only be construed to mean: (a) that a proper application has to be made; and (b) that such application be made to a judge and not to the SAR. He further contends that in the instant case, the PO was granted by the SAR who had no competent jurisdiction to do so.

Let me say at the outset that I accept the stand taken by counsel that an application has to be made for the PO to be issued. However, there is no specific mode or procedure provided under the RHC as to how this is to be done, but I understand, there is a practice that it is done through the filing of a 'Praecipe Untuk Perintah Larangan' addressed to the Pendaftar, Mahkamah Tinggi, who, after consideration, would issue what is called a

'Perintah Larangan Penahanan Dalam Pelaksanaan'. It is also the practice that there would be a concurrent application by the JC for the issuance of a WSS against the JD through the filing of a 'Praecipe Untuk Writ Pelaksanaan', although there have been cases which appear to indicate that protracted and separate applications were allowed (see *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116; *K Murugesu v Michael Chong Ngian Fong; K Murugesu v Registrar of Titles & Ors* [1980] 2 MLJ 84; *Ban Hin Lee Credit Sdn Bhd v Utama Computer Centre Sdn Bhd & Ors* [1991] 2 MLJ 327). The same cases also seem to indicate that where separate applications were made, it was the practice to apply for the PO before the WSS.

Mr Selva has further submitted that the SAR was not the competent jurisdiction to deal with any application for a PO. In this connection, he draws support from O 47 r 6(5) which I have alluded earlier, placing particular emphasis on the words 'the Court or a Judge' therein. Now, the word 'Court' has been defined under O 1 r 4(2) which reads:

> In these rules, unless the context otherwise requires, 'Court' means the High Court or any one or more Judges thereof, whether sitting in Court or in Chambers, or the Registrar; but the foregoing provision shall not be taken as affecting any provision of these rules and, in particular, Order 32 rule 9, by virtue of which the authority and jurisdiction of the Registrar is defined and regulated.

And O 32 r 9 reads:

> The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or these rules may be transacted and exercised by a Judge in Chambers except such business, authority and jurisdiction as the Chief Justice may from time to time direct to be transacted or exercised by a Judge in person or as may be by any of these rules be expressly directed to be transacted or exercised by a Judge in person.

In the light of these rules, I am of the view that an application can be dealt with by the deputy registrar, or the SAR or by the judge himself if he so wishes. In the circumstances, Mr Selva's contention that the SAR has not the competent jurisdiction holds no water.

I come now to the second underlying issue raised by the JD contending that the PO dated 12 March 1998 has been wrongfully obtained. The complaint is that the JC had obtained the PO through a procedure which was meant for a WSS and therefore the PO granted by the SAR is invalid. In this connection, Mr Selva refers to encl 2 which although in effect an application to the SAR for the issuance of a WSS against the JD, nevertheless, bears the heading 'Praecipe Untuk Perintah Larangan'. The body of this praecipe however seeks an issuance of a WSS. And it was on the basis of this praecipe that the SAR apparently granted the PO in encl 3. As I have described earlier, it is the practice as I understand it in West Malaysia that in order to obtain a PO, it is necessary to apply by way of 'Praecipe Untuk Perintah Larangan'. This procedure has not been strictly followed in the instant case. There is a defect in the application which must militate against the granting of the PO. In the circumstances, the PO in question cannot be said to have been validly granted. This I so hold.

The first proposition now calls for consideration. Here, it is contended that, as a matter of law, there is no necessity for the issuance of a WSS where the subject matter concerns immovable property. There is substance in the contention. I say so for the following reasons. First, the RHC do not specifically provide for one.

Secondly, once the PO has been granted, it tantamounts to an authorization for seizure of the immovable property. This is evident in the provisions of O 47 rr 6(1) and (3) which read:

> Where the property to be seized consists of immovable property or any registered interest therein the following provisions shall apply:
>
> (1) Seizure shall be made by an order prohibiting the judgment-debtor from transferring, charging or leasing such property or interest ...
>
> (3) No prohibitory order issued under this rule shall affect any immovable property or registered interest therein and no immovable property or registered interest therein shall be deemed to have been seized until such prohibitory order shall have been registered as provided by any written law relating to such land; ...

Thirdly, the issue of sale of immovable property is subject to a separate application, usually by way of summons-in-chambers. (See ss 256 and 337 of the National Land Code 1965 and O 47 r 1(3) of the RHC). It is to be noted that such application has to be made to and dealt with by the judge himself. This is reflected in O 47 r 7. Indeed, a Practice Note No 2 of 1987 under the title 'Order for Sale under the National Land Code 1965' has been issued to that effect.

Be that as it may, it is the practice, as I have said, for the JC to apply for both the PO and the WSS concurrently and this is done through the procedure which I have described earlier. Given such a practice, the position in the instant case is that, the WSS granted would have been adversely affected since the PO is found to have been wrongfully obtained and, therefore, invalid. The said WSS would have suffered the same fate. But if separate applications are allowed as some of the authorities, which I have cited, seem to indicate, then the procedure to be adopted is to first apply for the PO to be followed by an application for a WSS. Even if this procedure is acceptable as a matter of practice, it would still militate against the granting of the WSS in the instant case since the PO connected thereto has been declared to have been wrongfully obtained. The said WSS would have been similarly tainted.

In the circumstances and for all the reasons stated, I find there is merit in the JD's application. I will therefore allow the application and order in terms of prayers (a), (b) and (c) thereof.

Application allowed.

Reported by Tan Kah Bee